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In The

Supreme Court of the United States

October Term, 1997

DEBRA J. FORD,

Petitioner,

vs.

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity; LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity; MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board; GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board; JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DANNY PRICE, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; DAVID LECROY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board; FRED PALMER, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a State official disrupt the efficient functioning of his office, thus tipping the *Pickering* balance in favor of the State as employer, based on the official's unlawful retaliatory response to an employee's speech on a matter of public concern?

2. Is the law clearly established, despite the lack of factually identical precedent, that a state official may not fire an employee for writing an anonymous letter accusing the official of misuse of state funds?

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APPENDIX

Appendix A — Final Judgment And Memorandum Opinion Of The United States District Court For The Northern District Of Alabama, Southern Division Entered August 28, 1996 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed July 18, 1997 ..... 16a

Debra J. Ford respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals (App. 16a) was not reported. The judgment and opinion of the lower court is unreported. (App. 1a).

STATEMENT OF JURISDICTION

The Eleventh Circuit released its decision on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Ford claims that the Respondents/Defendants violated her First Amendment right to free speech. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech.") This action was brought pursuant to 42 U.S.C. § 1983 (Supp. 1997); section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner Debra J. Ford sued Respondents Edgar Lawrence, Lewis Moore, Mickey Drummond, Gerald Smith, John Riley, Danny Price, David Lecroy, and Fred Palmer (hereinafter, collectively, "Examining Board"), in their official capacities, in the district court for the Northern District of Alabama. Ford also sued Lawrence and Moore in their individual capacities; Moore was later dismissed in his individual capacity. The Complaint was filed on July 17, 1995.

A. The Underlying Action

Ford was employed as a clerk/typist at the Plumbers and Gas Fitters Examining Board, an agency of the State of Alabama. Exh. 38-Exh. 10-1. The Examining Board is governed by a Board of Directors, and the operations of the agency are administered by an Executive Director, Lawrence, appointed by the Board of Directors. Ford's duties included "answering the telephone, greeting people . . . when they came in, [r]enewing people's certifications, typing, filing, working on the computer." Exh. 38-33. She saw Lawrence if he was in the office. *Id.* at 37. The duties she performed for Lawrence included answering the telephone for him, handing him his mail, and other services — such as pulling files — when requested, which was seldom. *Id.* at 38-39. She filed compliance officers' reports and itineraries. *Id.* at 41-42. She also checked on individuals' certifications when requested by compliance officers. *Id.* at 39-42.

Ford stated that Lawrence was a "real good boss." *Id.* at 32. She testified that he did not mistreat the employees, and that she did not hold any ill will toward him. *Id.* at 32-33. Lawrence gave her good reviews. *Id.* at 33. Lawrence testified that, before Ford wrote the letter, he thought Ford was a good employee. Exh. 39-95.

During the Fall of 1994, David Wilcox, a compliance officer for the Examining Board, informed Ford that Lawrence was planning to use his state vehicle to carry his wife to and from South Alabama, where Lawrence's wife was planning to work in a restaurant. *See* Exh. 38-Exh. 3-1-2. This personal use of a state vehicle is a violation of state law. *See* Ala. Code § 36-25-5. At this same time, Lawrence had obtained a "cover" tag for his state vehicle. Exh. 39-27-29. A cover tag is a license plate that does not carry any indication that the vehicle is owned by the State; rather, such a tag resembles in all aspects a personal license plate. *See* Exh. 39-Exh. 10.

In response to what she perceived as a possible misuse of state funds, Ford wrote a letter, stating that Lawrence's use of a cover tag was suspicious. Exh. 38-56-59, 60, 64-65 & Exh. 1. The letter stated:

> Why is it that the Executive Director of the State of Alabama Plumbers and Gas Fitters Examining Board, Mr. Edgar Lawrence, is driving a 1994 Caprice automobile bought and paid for by that Agency without a State License Plate or any other markings on it to identify it as a State owned vehicle? This automobile is being driven around with a regular license plate on it. I think it very suspicious that Mr. Lawrence is the one who has this type of license plate on his vehicle when the Compliance Officers for this agency who actually go out in the field to investigate complaints do not have them also. It would appear that Mr. Lawrence has decided to use this vehicle for his own personal use instead of just for STATE OF ALABAMA *business* as it was intended for it to be used.

Ford signed the letter, "A Very Concerned Citizen." Exh. 39-35-48-49. Ford sent the letter anonymously because she "knew that if Mr. Lawrence knew right off the bat who had [written] it, that he would fire whoever wrote it." Exh. 38-72.

She sent this letter to four members of the Board: Fred Palmer, John Riley, David Lecroy, and Danny Price. *See* Exh. 38-Exh. 1. Ford and Wilcox had discussed that Price, a Board member whose term was nearing the end, might be helpful in investigating the matter. Exh. 38-61 and Exh. 38-Exh. 3-3. Ford gave the letter to her friend, Patsy Williams, and asked her to mail the letter. *Id.* at 69-72. She asked her to mail the letter from somewhere other than Jasper, Ford's home town. *Id.* at 71-72. Subsequently, Williams gave the letter to one of the truck drivers at her office and asked the driver to drop the letter in a mail box. The driver mailed the letters from Huntsville.

After he received the letter, Lecroy, one of the Board members, called Lawrence and sent him a copy of the letter. Exh. 39-35-36. Lawrence them contacted the other members of the Board. *Id.* at 36. According to Lawrence, no Board member questioned him about his personal use of his state vehicle. *Id.* at 68-71. Lawrence thought that the letter was from a "disgruntled" employee, although the letter was signed "A Very Concerned Citizen." *Id.* at 48-49.

When he received the letter, Lawrence began to seek the identity of the "disgruntled employee." *Id.* at 38. His suspicions fell on those employees working in or near Huntsville. *Id.* He looked at itineraries for the previous two weeks "to see who had been in Huntsville." *Id.* He claims that he asked every employee if they knew who wrote the letter, although he did not ask Ford if she had written the letter, and he did not show her the letter until the day she was terminated. *Id.* at 54-55, 62.

Lawrence showed the letter to the compliance officers working in South Alabama. *See* Exh. 42-55. A couple of weeks later, these compliance officers, Wilcox, Mike Leonhardi, and David Wilson, were in the Birmingham office discussing, among other things, the letter. *Id.* at 54-55; *see also* Exh. 38-Exh. 4. They repeatedly asked Ford if she knew who had written the letter; Ford told them that she had written the letter. Exh. 38-Exh. 4. She asked the officers not to tell Lawrence she had written the letter because he would fire her, and they agreed. *Id.* at 78-79 and Exh. 4. The compliance officers and Ford were generally in agreement that Lawrence would terminate or otherwise punish the person who had written the letter. *Id.* at 79; Exh. 42-72, 76-78.

Subsequently, Leonhardi and Lawrence were at a meeting in Montgomery and Lawrence asked Leonhardi who had written the letter. Exh. 39-46-50. Leonhardi told Lawrence that Ford had written the letter. Exh. 42-84. When Ford discovered that Leonhardi had told Lawrence she had written the letter, she confronted Leonhardi. Exh. 38-93 & Exh. 5. Leonhardi said that he knew had he promised not to tell Lawrence that Ford had written the letter, but Lawrence had asked him who had written the letter. *Id.* at 93-95 and Exh. 5. Leonhardi claims that Ford called him a "son-of-a bitch" and that this upset him because Ford was a woman. *Id.* at 91-93 ("I know it sounds bad. But yeah, for a woman to say that, yeah, it was shocking to me. . . . It would not shock me if a man said it as badly. [sic] I know that sounds sexist."). Ford denies that she used any abusive language. Lawrence testified that he had never heard Ms. Ford use abusive language. *Id.* at 39-87.

Leonhardi was upset that Hub Gravlee and Bud Waters, Examining Board employees who lived and/or worked in the Huntsville area, might "get in trouble" for writing the letter. Exh. 42-71. He "figured" whoever wrote the letter would probably get in trouble. *Id.* at 88.

The morning after Lawrence returned to the office, he asked to see Ford first thing. Exh. 38-62. He showed Ford the letter and asked her if she had written it. *Id.* She replied that she had. *Id.* at 63. Lawrence then presented Ford with a resignation letter for her signature that he had prepared the previous night, before he had talked to Ford. Exh. 39-56-57, 64, 72, 96-97 & Exhs.7 & 8. Ford refused to sign the letter, and Lawrence terminated her. Exh. 39-72-74 & Exhs. 7 & 8. The reasons stated for her termination were: (1) disruptive conduct; (2) insubordination; and (3) abusive language. Exh. 39-Exh. 9-¶ 1.

B. Proceedings Below

Ford filed a complaint against defendants/respondents alleging that they had terminated her employment with the Examining Board in violation of her First Amendment/free speech rights. R1-1. After discovery, the defendants moved for summary judgment on the grounds that her termination was proper under the *Pickering* balancing test and that Lawrence was immune from suit under the qualified immunity doctrine.

The district court granted the defendants' motion. (App. 1a). In the accompanying Memorandum Opinion, the district court held:

> Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a [sic] accusations and recriminations among employees who must work with mutual trust.

(App. 12a). Therefore, it dismissed the claims against Lawrence in his individual capacity based on qualified immunity. (App. 14a). The district court also dismissed the official capacity claims against the Examining Board "based on the manner and form of plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There [was] no way that plaintiff, Lawrence and perhaps others could continue to work together in mutual trust." (App. 15a). On August 28, 1996, it entered an order dismissing all claims. Ford filed a timely notice of appeal and appealed to the Eleventh Circuit Court of Appeals.

Jurisdiction in the Eleventh Circuit Court of Appeals was pursuant to 28 U.S.C. § 1291, as this was an appeal from a final judgment.

The Eleventh Circuit affirmed the district court with no opinion. (App. 16a).

REASONS FOR GRANTING THE WRIT

I.

CAN A STATE OFFICIAL DISRUPT THE EFFICIENT FUNCTIONING OF HIS OFFICE, THUS TIPPING THE *PICKERING* BALANCE IN FAVOR OF THE STATE AS EMPLOYER, BASED ON THE OFFICIAL'S UNLAWFUL RETALIATORY RESPONSE TO AN EMPLOYEE'S SPEECH ON A MATTER OF PUBLIC CONCERN?

In its opinion, the district court held:

On consideration of *Pickering*,[1] *Connick*[2]

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1. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

2. *Connick v. Myers*, 461 U.S. 138 (1983).

> and other cases and the "time, place and manner" of the letter, the court concludes that there was no Constitutional violation. While there may be an issue as to the essential "public concern" element, the court's decision is based upon the manner and form of the plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There is no way that [Ford], Lawrence and perhaps other could continue to work together in mutual trust.

App. 14a-15a (footnotes omitted).

The district court's opinion indicates that it believed that the Examining Board's interest as an employer outweighed Ford's free-speech interest because of the "manner and form" of her speech. As stated above, Ford sent an anonymous letter to four members of the Board, complaining that Lawrence may be using his state car for excessive personal use. The letter was post-marked from Huntsville, Alabama.

The purpose of the so-called balancing test was explained by this Court as follows:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This balancing in

> necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

Rankin v. McPherson, 483 U.S. 378, 384 (1987) (quoting *Pickering*, 391 U.S. at 568, 574; other internal citations omitted) (emphasis in original).

The focus of the balancing test is on the State's interest in "the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin*, 483 U.S. at 388. The State has the burden of "justifying a particular discharge"; this burden "varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150. "[A] stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152.

However, the evidence presented to the district court showed that the letter did not interfere with the work of the Examining Board, affect personnel relationships, or affect Ford's job performance. All of the adverse consequences arose, not from the speech, but from Lawrence's quest to punish the speaker. Ford was fired for the content of her speech, not its effect on the efficient functioning of the Examining Board.

Although "private expression . . . may in some situations bring additional factors to the *Pickering* calculus," *Givhan v. Western Consolidated School District*, 439 U.S. 410, 415, n.4 (1979), "a purely private statement on a matter of public concern will rarely, if ever, justify discharge of a public employee." *Rankin*, 483 U.S. at 388, n.13 (agreeing with J. Powell's concurring opinion, in which he wrote, "If a statement is on a matter of public concern, as it is here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk of a single, off-hand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful." *Id.* at 393 (Powell. J., concurring)). The speech in this case was a letter, mailed to four board members; it was not disseminated by Ford to other employees, although Lawrence eventually discussed the letter with most of the employees.

Speech that "seek[s] to bring to light actual or potential wrongdoing or breach of public trust on the part of [government officials]," *Connick*, 461 U.S. at 148, is "a core concern of the First Amendment." *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996) (quoting *Connick*, 461 U.S. at 148); *see also Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988), *cert. denied sub nom, Leon v. Avino*, 489 U.S. 1013 (1989). The speech in this case is the anonymous letter. The content of the

letter clearly seeks to expose potential wrongdoing or breach of the public trust by Lawrence, *i.e.*, his improper personal use of the state automobile. Thus, the content of the speech falls within the "core concern of the First Amendment." *See Fikes*, 79 F.3d at 1084. Moreover, Ford's speech was "private" in the sense that it was internal. This Court has held, "The First Amendment forbids the abridgement of the 'freedom of speech.' Neither the Amendment itself not our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan*, 439 U.S. at 415-16. In this case, Ford did not lose her right to free speech, and the manner of her communication weighed in her favor because the letter was not disruptive to the office. That is, it was not disruptive until Lawrence decided that he would punish the author for accusing him of malfeasance.

The district court also found that the anonymity of the letter and the Huntsville postmark balanced in favor of the employer because it caused "accusations and recriminations among employees." (App. 12a). This Court has held that the decision to communicate anonymously is an "aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511, 1516 (1995). Moreover, the facts of this case clearly demonstrate the value of protecting anonymous speech on issues of public concern regarding the reporting of possible malfeasance of office. Ford presented evidence that she believed that Lawrence would fire her for reporting the misuse of his state vehicle. She also presented testimony that other employees agreed with her assessment. Indeed, Leonhardi had told Lawrence that Ford had written the letter because he was afraid that Lawrence would retaliate against the employees that lived and/or worked in Huntsville.

The district court, relying on arguments of the defendants,

held that the situation created by Lawrence's attempts to determine the author of the letter so that he could punish him/her was sufficiently disruptive of the efficient functioning of the office to hold that the balance favored the Examining Board, and not Ford's speech. However, the speech, which is of core concern, did not disrupt the functioning of the office; clearly, Lawrence's quest to punish the speaker for the content of the speech — which violates the First Amendment — was the only disruptive influence in the office.

"*Pickering* states that the First Amendment *requires the government* not just to show that certain employee speech injures the government, but *to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society.*" *Porter v. Califano*, 592 F.2d 770, 779 (5th Cir. 1979) (emphasis added). Thus, after a plaintiff shows that the speech was upon a matter of public concern, it is the *State's burden* to justify the discharge; the more substantially the employee's speech involves matters of public concern, the stronger the State's showing that the discharge was justified must be. *Connick*, 461 U.S. at 150-52.

> *The First Amendment balancing test can hardly be controlled by a finding that disruption did occur.* An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be *absurd* to hold that the First Amendment generally authorizes *corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.* Of course, as *Pickering* indicates, the chilling of even accurate speech may be justified in certain extreme situations, for

> example, in which the employee unduly breached confidentiality or disrupted intimate working relationships. The point is simply that the balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scale.

Porter, 592 F.2d at 773-74 (emphasis added).

In this case, Ford had information that Lawrence may be using his state vehicle for excessive personal use. She reported this information to several of the Board members that she thought would investigate the matter. *See* Exh. 38-61 & Exh. 3-3. The letter was anonymous because she feared retaliation from Lawrence. *Id.* at 72. Her speech clearly raised a "core" concern of the First Amendment by informing the Board of Lawrence's possible malfeasance. She did not seek to publicize her concerns in a manner that would damage the public reputation of the Examining Board or Lawrence, nor did she spend the agency's time "broadcasting [her] rancor." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). The operations of the agency were not disrupted by the speech; rather, any disruption was the result of Lawrence's search for the author of the letter with the intent to punish that employee for the content of his or her speech. The balancing of interests is clearly in favor of the plaintiff's exercise of her First Amendment rights.

II.

IS THE LAW CLEARLY ESTABLISHED, DESPITE THE LACK OF FACTUALLY IDENTICAL PRECEDENT, THAT A STATE OFFICIAL MAY NOT FIRE AN EMPLOYEE FOR WRITING AN ANONYMOUS LETTER ACCUSING THE OFFICIAL OF MISUSE OF STATE FUNDS?

The district court held:

> Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a [sic] accusations and recriminations among employees who must work with mutual trust.

(App. 12a).

This statement reflects an erroneous analysis of the defense of qualified immunity.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> When the law contemplates some kind of balancing test to determine the ultimate

> question of lawfulness or unlawfulness of an act, qualified immunity almost always applies to shield the public servant defendant: the lack of bright lines associated with balancing tests prevents the preexisting law, given the circumstances of a specific case, from having been clearly established when the public servant took the step that resulted in his later being a defendant in a lawsuit.

Foy v. Holston, 94 F.3d 1528, 1535, n.8 (11th Cir. 1996) (citing *Hansen v. Soldenwagner*, 19 F.3d 573, 575 (11th Cir. 1994)).

Analysis of allegations of violations of a public employee's right to free speech necessarily involve the *Pickering* balancing test. "Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary circumstances where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Cooper v. Smith*, 89 F.3d 761, 764 (11th Cir. 1996) (an example of such an inevitable case; plaintiff was terminated for cooperating with investigation into allegations of corruption).

In *Harlow*, this Court held:

> By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct.* The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would

> violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)) (emphasis added).

"Some sacrifice of individual rights for the sake of effective government is the inevitable price of living in a society organized and run by fallible human beings." Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 Cornell L. Rev. 462, 470 (1990) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("The concept of immunity assumes . . . that it is better to risk some error and possible injury from such error than not to decide at all.")). However, despite the admonition of this Court to the contrary, the Eleventh Circuit has required the existence of a factually indistinguishable case in order to find that the law is clearly established.

The Eleventh Circuit has held that a plaintiff, defending against a claim of qualified immunity, "must establish more than broad legal truisms; [s]he . . . must demonstrate that the law fixed the contours of the right so clearly that a reasonable official would have understood his acts were unlawful." *Dolhite v. Maughon*, 74 F.3d 1027, 1040-41 (11th Cir.), *cert. denied*, 117 S. Ct. 185 (1996). Thus, "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the

circumstances." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). Moreover, officials need not " 'be creative or imaginative in drawing analogies from previously decided cases.' " *Id.* at 1150 (citations omitted).

> If the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. The line is not to be found in abstractions — to act reasonably, to act with probable cause, and so forth — but in studying how these abstractions have been applied in concrete circumstances.
>
> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

Suissa v. Fulton County, 74 F.3d 266, 269-70 (11th Cir. 1996). *Cf. McMillian v. Johnson*, 88 F.3d 1554, 1565 ("Nevertheless, for the law to be clearly established, a court need not have found the *very action* in question unlawful; *what is essential is that the action's unlawfulness be apparent in light of pre-existing law.*") (emphasis added), *amended*, 101 F.3d 1363 (11th Cir. 1996).[3]

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3. In *McMillian*, a case regarding liability for punishment of a pre-trial detainee. The Eleventh Circuit held:

(Cont'd)

The facts show that Lawrence knew that Ford had written an anonymous letter accusing him of possible misuse of his state vehicle. He knew that the letter had been sent to Board members. He also knew that he had attempted to find out who wrote the letter. He considered the letter to be a challenge to his authority, even though the letter does not challenge Lawrence's authority, but reports his possible misuse of his state vehicle. He knew that he had targeted Hub Gravlee and Bud Waters as possible authors; the fact that other employees were at risk of discipline for accusing Lawrence of misusing his state vehicle upset Leonhardi. Lawrence knew that Leonhardi was upset and had alleged that Ford had called him a "son-of-a-bitch;" however, he also knew that he had never heard Ford use such language. He knew that Leonhardi claimed that Ford had used the appellation in response to learning that Leonhardi had told Lawrence that Ford had written the letter. Lawrence did not know that the office was less efficient because of the letter. Finally, Lawrence had planned to terminate Ford's employment prior to even asking her if she wrote the letter, which she did not deny writing, or if she had used abusive language to Leonhardi, which she did deny.

(Cont'd)

> We do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining a pretrial detainee on death row to punish him is unconstitutional. *Bell*'s prohibition on *any* pretrial punishment, defined to include conditions imposed with an intent to punish, should have made it obvious to all reasonable officials in [the defendants'] place[es] that holding McMillian on death row to punish him before he was tried violated McMillian's due process rights.

McMillian, 88 F.3d at 1565 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)) (emphasis in original).

The district court held that, because there was no case that "clearly establish[ed] that it violates the First Amendment to terminate an employee who writes an anonymous letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing accusations and recriminations among employees," Lawrence was entitled to qualified immunity. (App. 12a-13a). However, this is not a dog bite case[4] and Lawrence cannot cloak himself in qualified immunity simply because, at the time of his actions, there was no case with the same facts.

> Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. It protects enforcement officers from bad guesses in gray areas and ensures that they are liable only for transgressing bright lines. Thus, although the exact conduct at issue need not have been held to be unlawful in order for the law governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest.

Wilson v. Layne, 110 F.3d 1071, 1075 (4th Cir. 1997) (internal quotations and citations omitted).

This Court, in an opinion addressing a conviction under 18 U.S.C. § 242, discussed the level of specificity required to hold that a Constitutional violation is "clearly established." *United States v. Lanier*, 117 S. Ct. 1219 (1997). The Court reversed the Sixth Circuit opinion, which had held that

4. It is generally, though not accurately, held that a dog is entitled to one bite before its owner will be said to be liable; the theory being that the owner was not aware of the animal's vicious propensities. *See Zarek v. Fredericks*, 138 F.2d 689, 690 (3d Cir. 1943).

> criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of [the Supreme] Court (not any other federal, or state, court), and only when the right has been held to apply in "a factual situation *fundamentally similar* to the one at bar."

Id. at 1223 (emphasis added). The Court equated the "clearly established" requirement under qualified immunity cases, with the "fair warning" requirement from "void-for-vagueness" cases. The Court held that the law could be "clearly established" without an existing case based on "fundamentally similar" facts. It held:

> [W]e think the Sixth Circuit's "fundamentally similar" standard would lead trial judges to demand a degree of certainly at once *unnecessarily* high and likely to beget much wrangling. . . .
>
> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants' "reasonably can anticipate when their conduct may give rise to liability," by attaching liability only if "the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. The fact that one

has a civil and the other has a criminal law role is of no significance; both serve the same objective, and in effect *the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.* To require something clearer than "clearly established" would, then, call for something beyond "fair warning."

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. *But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful.* As Judge Daughtrey noted in her dissenting opinion in this case, "[t]he easiest cases don't even arise. . . ." In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that *it may be imposed for deprivation of a*

> *constitutional right if, but only if, "in light of pre-existing law the unlawfulness [under the Constitution is] apparent." Where it is, the constitutional requirement of fair warning is satisfied.*

Id. at 1227-28 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)) (other internal quotations and citations omitted; emphasis added).[5]

The Court's opinion lessens considerably the strict reliance on a "spotted cow" case[6] to establish "fair warning" that the official's conduct violates a constitutional right. This Court has emphasized the need for similar factual situations in order to prove that the law was "clearly established." However, as recently held by the Supreme Court, the standard is whether the law is such that a reasonable official would have "fair warning" that his or her conduct violates a constitutional right.

5.

> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Creighton, 483 U.S. at 639-40.

6. A "spotted cow" case is a case that "is exactly like the case that is before the Court." *Picker International, Inc. v. Parten*, 935 F.2d 257, 261 (11th Cir. 1991).

For example, the Seventh Circuit, in *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994), held that, reading the complaint in the light most favorable to the plaintiff, the complaint stated that the defendant/public employer had "punished" the plaintiff/public employee for writing a novel, "without having any legitimate reason for such punishment." The court went on to state, in response to the defense of qualified immunity, "This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles. The easiest cases don't even arise." *Id.* (internal citations and quotations omitted).

The law was clearly established that Lawrence's conduct violated Ford's First Amendment/free speech rights. In this case, Ford wrote an anonymous letter accusing Lawrence of malfeasance in office. For this, she was fired. As justification for firing her, Lawrence claimed that she was insubordinate. The evidence shows that he considered her insubordinate for complaining about him to the Board members. He also said that her conduct disrupted the office; nevertheless, he testified that he did not observe any disruption prior to her being fired. He also claimed that she was fired for using abusive language to Leonhardi. However, Lawrence never questioned Ford regarding abusive language, Ford denies using any abusive language, and Lawrence testified that he had never heard Ford use any abusive language. In short, there was no good reason to fire Ford.

Thus, although there is no case exactly on point, the evidence overwhelming indicates there is no evidence to weigh on the Examining Board's side of the *Pickering* scale against Ford strong right to speak out against Lawrence's abuse of his office. Other than the content of her speech that accused him of wrongdoing, there was no reason for Lawrence to fire Ford, and a reasonable official would know that he could not fire a public

employee for expressing her right to speak on a matter of public concern in the absence of a countervailing interest of the State as an employer. Accordingly, Lawrence was not entitled to qualified immunity from suit.

CONCLUSION

Based on the foregoing, Ford respectfully requests this Court accept this petition and grant her a writ of certiorari.

Respectfully submitted,

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REBECCA J. ANTHONY
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APPENDIX A — FINAL JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED AUGUST 28, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 95-PT-1807-S

DEBRA J. FORD,

Plaintiff,

vs.

EDGAR LAWRENCE, et al,

Defendants.

FINAL JUDGMENT

In accordance with a Memorandum Opinion filed contemporaneously herewith, defendants' Motion For Summary Judgment filed on June 14, 1996 is **GRANTED**. This action is **DISMISSED WITH PREJUDICE**. Costs are assessed against plaintiff.

DONE and **ORDERED** this 28th day of August, 1996.

s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 95-PT-1807-S

DEBRA J. FORD,

Plaintiff,

vs.

EDGAR LAWRENCE, et al,

Defendants.

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion for Summary Judgment filed on June 14, 1996.

On or about September 17, 1994, plaintiff caused an anonymous letter to be mailed to four members of the Plumbers and Gas Fitters Examining Board (Board). The letter raised a question about the use by defendant Edgar Lawrence of a state owned automobile. At the pertinent time(s), Lawrence was the Executive Director of the Board. Plaintiff's anonymous letter stated that Lawrence was using an ordinary automobile license tag on the state owned vehicle rather than a state tag. The inference suggested was that Lawrence was using the state owned vehicle for private purposes.

The publication of the letter caused Lawrence to question

various members of his staff about the letter. One staff member told Lawrence that plaintiff had acknowledged writing the letter. Lawrence terminated plaintiff. She appealed her dismissal and a hearing officer appointed by the Personnel Board of the State of Alabama recommended that "the termination order be sustained." The Personnel Board affirmed the decision to terminate plaintiff.

In her recommendation, the hearing officer noted, *inter alia*, the following:

> Lawrence testified private vehicles are routinely replaced with State tags. A private tag is used for unusual circumstances. For example on one occasion Lawrence went to the Mobile area to conduct an investigation where the use of his personal issued tag was placed on the vehicle to avoid the identification process.
>
> . . .
>
> The purpose of an unmarked vehicle, according to the witness, was to aid in the investigation of uncertified persons who are performing gas and plumbing work particularly around the Alabama borders. Any person may letter petition the probate judge with the VIN number and other description of the vehicle detailing therein why a cover tag is needed. The person would pay taxes of $3.00 per day for use of vehicle for going back and forth to work.

Appendix A

. . .

Lawrence testified he suspected two other employees because they worked in the Huntsville area. The unsigned letter was stamped with a Huntsville, Alabama postmark.

Two employees told Lawrence, Debra Ford had written the letter. At one point Ford brought a faxed copy which contained the letter to the witness.

The Board, on consideration, upheld termination of employee.

Debra Ford admitted going into Lawrence['s] file folder and taking out information as to the car tag. She did, however, deny any abusive language which interrupted the process.

On September 14 or 15 witnesses testified to writing a letter to the Board upon noticing Lawrence's vehicle with a private tag and not a state tag. Ford testified she did not do anything about these factors when she first observed them.

. . .

Ford testified to giving a friend Patsy Williams the unsigned letter who gave the

letter to a truck driver either at Williams home or her office.

. . .

Lewis Moore, Chairman of the Plumbers & Fitters Examiners Board. On board since 1988. He served for 30 years as superintendent of the Water Board of Sheffield.

When Lawrence called and told him what the letter said, Chairman Moore told Lawrence he would terminate a person on insubordination for such activity.

. . .

Moore said he had a problem with Ford's conduct because of the false implications and Ford's trying to set up two other people.

. . .

Employee Ford wrote and published an unsigned letter to members of the Plumbers and Gas Fitters Board. Therein she maliciously accused and implied actual and open misconduct by the executive director. Ms. Ford accused Mr. Edgar Lawrence [of] operating his state owned and issued vehicle for Lawrence's personal use and further placing a personal vehicle license tag on the

State owned and issued vehicle in order, she felt, to conceal such personal use.

Ms. Ford admitted to three compliance officers that she sent the letter. Thereafter she called Hardy and cursed him for telling Lawrence what she said.

. . .

Employee chose to forward anonymous letter and went to great length to conceal her identity by having the letter mailed from Huntsville by a truck driver.

Other employees may have been caused great harm had Ford not ultimately admitted her participation.

Also, the endurable [sic] stress and discomfort of the work environment which was visited upon employees during the investigative process may not have occurred had employee Ford revealed her identity when she wrote the letter.

Any employee should be allowed to properly inquire into office procedure and policy. A more direct inquiry into the matter could have been beneficial to the employee.

. . .

Appendix A

After consulting all the evidence presented, the Hearing Officer is of the opinion [that] the statements and actions of employee Ford produced unnecessary, unreasonable, and disrespective behavior.

The conduct as established is improper and unacceptable. Employee used work time, supplies, equipment and files to arrive at an erroneous conclusion which caused employee Edgar Lawrence embarrassment, harm and possible damage to his reputation and work record by having to investigate improperly gathered allegations and information.

The behavior should not be tolerated.

The termination as enacted and upheld by the Board of the Plumbers and Gas Fitters is persuasive.

It is therefore the recommendation of the Hearing Officer that the termination order be sustained.[1]

/s/ Carole C. Smitherman, Hearing Officer.

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1. The court does not reach any possible issue of collateral estoppel related to the pursuance of an administrative appeal, the availability thereafter of state court review, the reservation or non-reservation of Constitutional issues, etc. In the event of an appeal, the parties may wish to address such issues. The court has also not reached the issue of Eleventh Amendment immunity as it relates to the official capacity claims. See also *Will v. Michigan Dept., etc.*, 491 U.S. 58 (1989) (neither state nor state officials in official capacities); and *Sharpley v. Davis*, 786 F.2d 1109 (11th Cir. 1986).

Appendix A

Claims Against Individual Defendants

The plaintiff has acknowledged that summary judgment is due to be granted as to defendant Moore in his individual capacity. The only other defendant sued in his individual capacity is Lawrence. The action against the Board members in their official capacities is the same as an action against the Plumbers and Gas Fitters Examining Board.

Qualified Immunity Assertion of Lawrence

In *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994), the court stated:

> Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known."

Id. at 575.

> To be established clearly, a right must be so particularized that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Pre-existing law—whether it be case law or statutory law—must be available to instruct in a concrete way the government agent, given the circumstances. "The contours of the right must be sufficiently

clear that a reasonable official would understand that what he is doing violates that right." *Id.* (emphasis added). A recent en banc decision explains plaintiff's considerable burden:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. *See, e.g., Edwards v. Gilbert*, 867 F.2d 1271, 1277 (11th Cir. 1989). Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), approved en banc, 998 F.2d 923 (11th Cir. 1993).

The question before us is not whether, in general, public employees enjoy some freedom under the First Amendment to speak on matters of public concern; they do. Nor is the question whether public employees have an interest in providing truthful testimony in criminal cases; they do. Here, as in all qualified immunity cases, the question is fact specific: in April 1990, was it clearly

established in this circuit that it was unconstitutional for police officials to investigate and to suspend an officer for making vulgar, insulting, and defiant criticisms of the department while giving testimony at a deposition pursuant to a subpoena? The answer is "No."

Past cases show that defendants who allegedly violate public employees' First Amendment freedoms rarely act within "clearly established" contours of law:

> The Supreme Court has never established a bright-line standard for determining when the State as an employer may take action adverse to an employee in response to that employee's speech. Instead, the Court has balanced the interest of the employee in commenting on matters of public concern against the interest of the employer in performing public services efficiently.

Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989) (citing *Pickering v. Board of Education*, 391 U.S. 563, 576, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Because Pickering requires a balancing of competing interests on a case-by-case

> basis, our decisions tilt strongly in favor of immunity by recognizing that only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated "clearly established" federal rights. See *Dartland*, 866 F.2d at 1323-24. When "no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the [act taken against] the employee was unlawful." *Id.* at 1323 (emphasis added); *see also Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1236-37 (11th Cir. 1992); *Busby v. City of Orlando*, 931 F.2d 764, 773-75 (11th Cir. 1991) (per curiam).

Id. at 575-76.

> The decisions in *Dartland* and *Sims* make clear that, because this multi-factor balancing process admits of few bright lines, a government agent will know only in the most extraordinary circumstances that "what he is doing" does violate plaintiff's rights. *Dartland*, 866 F.2d at 1323; *Sims*, 972 F.2d at 1236-37.

Id. at 576.

> Precedents recognize that the manner of a public employee's speech is an important element in the Pickering balance. *See Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988); *Bryson*, 888 F.2d at 1567.

Id. at 577.

> In this case, the Pickering balance is also affected—and its outcome made doubtful—by the special concerns of quasi-military organizations such as police departments. Order and morale are critical to successful police work: a police department is "a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers."

Id. at 577.[2]

Plaintiff has not cited any cases which clearly establish that it violates the First Amendment to terminate an employee who writes *an anonymous* letter which impugns the integrity of the supervisor and leaves him to speculate or further inquire as to the author, thus causing a accusations and recriminations among employees who must work with mutual trust.[3]

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2. The court notes that the Board investigates various circumstances under its jurisdiction.

3. Also see *Cross v. State of Alabama*, 49 F.3d 1490, 1503 (11th (Cont'd)

Appendix A

(Cont'd)

Cir. 1951) While the court does not rely on the point it does note that while plaintiff disputes that she called a fellow employee a SOB after he reported that she wrote the letter, it is apparently undisputed that Lawrence was so informed. In the alternative, the court does determine that a *Pickering* analysis leads to the conclusion that there has been no Constitutional violation. *See Pickering v. Board of Ed., etc.*, 391, U.S. 563, 568-70 where the court said:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

. . .

> An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.

. . .

(Cont'd)

Appendix A

The motion will be granted as to the claim against Lawrence in his individual capacity.

Official Capacity Claims

On consideration of *Pickering, Connick* and other cases and the "time, place and manner" of the letter, the court concludes that there was no Constitutional violation. While there may be an issue as to the essential "public concern" element,[4] the court's

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(Cont'd)

> Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

Plaintiff's duties for Lawrence are listed in her brief. They indicate the need for mutual trust. Cf. *McDaniel v. Woodard*, 886 F.2d 311 (11th Cir. 1989).

4. In her deposition, plaintiff stated,

> Q. So there was nothing illegal in your mind as far as the fact he had obtained the private tag, was there?
>
> A. No sir.
>
> Q. What bothered you about it was that he had it and the guys in the field didn't?
>
> A. Right.
>
> Q. And he didn't need it for that reason because he doesn't investigate?

(Cont'd)

decision is based upon the manner and form of plaintiff's action, the need for a close working relationship, and the fact that her supervisor's integrity was impugned. There is no way that plaintiff, Lawrence and perhaps others could continue to work together in mutual trust.[5]

Plaintiff had an appropriate remedy under state law. Although the availability of such a remedy does not defeat a fundamental Constitutional claim, it does suggest that all such personnel decisions need not rise to a Constitutional level, particularly where, as here, the purported Constitutional violation is anything but clear.[6]

The case will be dismissed.[7]

This 28 day of August, 1996.

s/ Robert B. Propst
ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

(Cont'd)

MS. ANTHONY: Object to form.

A. Right.

5. The court notes that since the letter was mailed from Huntsville rather than from where plaintiff worked or resided, employees who worked in the Huntsville area were initially suspected.

6. Again, the court does not address any possible collateral estoppel or *res judicata* issues when Constitutional claims are not reserved. The court also does not reach Eleventh Amendment or *Will* issues.

7. The motion to disqualify is moot. The court's final decision is not based upon attorney advice.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 18, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6989

D. C. Docket No. CV-95-PT-1807-S

DEBRA J. FORD,

Plaintiff-Appellant,

versus

EDGAR LAWRENCE, in his official capacity as the Executive Director of Plumbers & Gas Fitters Examining Board and in his individual capacity, LEWIS MOORE, in his official capacity as Chairman of the Plumbers & Gas Fitters Examining Board and in his individual capacity, MICKEY DRUMMOND, in his official capacity as vice-chairman of the Plumbers & Gas Fitters Examining Board, GERALD SMITH, in his official capacity as Secretary of the Plumbers & Gas Fitters Examining Board, JOHN RILEY, in his official capacity as a member of the Plumbers & Gas Fitters Examining Board, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 18, 1997)

Appendix B

Before ANDERSON and COX, Circuit Judges, and ALARCON*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Circuit Rule 36-1.

"Costs taxed against plaintiff-appellant."

Entered: July 18, 1997
For the Court: Miguel J. Cortez, Clerk
By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 8/18/97

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* Honorable Arthur L. Alarcon, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.